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85-1742

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Julian W. Rawl, Administrator of the
Estate of Edwin E. Rawl, Jr.,
Petitioner,

v.

United States of America.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Certiorari should be granted to review the Fourth Circuit's practice of circumventing the protections afforded the findings of fact of a trial court under Rule 52(a), Federal Rules of Civil Procedure, by characterizing its de novo findings of fact as corrections of the District Court's error of law.

2. Certiorari should be granted to resolve a conflict in the circuits and within the Fourth Circuit regarding whether Rule 52(a), Federal Rules of civil procedure, forbids appellate review of trial court findings of negligence as findings of fact.

PARTIES

The parties to this proceeding are Julian W. Rawl, as Administrator of the Estate of Edwin E. Rawl, Jr., and the United States of America.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Rule Involved	3
Statement of the Case	3
Reasons for Granting the Writ	26
Conclusion	64

Page

APPENDIX

District Court Findings of Fact and Conclusions of Law, October 12, 1984. 2

Judgment, October 15, 1984. 38

Opinion of the Court of Appeals, December 4, 1985. 39

Order of the Court of Appeals Denying Rehearing and Rehearing En Banc, January 21, 1986. 58

TABLE OF AUTHORITIES

Page

Cases

Anderson v. City of Bessemer City, 470 U.S. _, 105 S. Ct. 1504 (1985) 30,31,38,42,56-60 . . . 24,26,27,28

Bethlehem Steel Corp. v. Yates, 438 F.2d 798 (5th Cir. 1971). 45

Bonds v. Mortensen and Lange, et al, 717 F.2d 123 (4th Cir. 1983). 54

Brown v. Howell, 327 SE2d 659 (S.C. App. 1985) 28,29

Dale v. Rosenfeld, 229 F.2d 855 (2d Cir. 1956) 46

Darter v. Greenville Community, Hotel Corp., 301 F.2d 70 (4th Cir. 1962) 29,50,61

Erie Lackawanna Ry. Co. v. Timpany, 495 F.2d 830 (2d Cir 1974) 47

Famous Knitware Corp. v. Drug Fair, Inc., 493 F.2d 251 (4th Cir. 1974) 55

Fuchstadt v. U.S., 434 F.2d 367 (2d Cir. 1970) 47,48

Graham v. Whitaker, 321 SE2d 40 282 S.C. 393 (1984) . . . 38,39,61

Hawkins v. Southern Ry. Co., 45 FRD. 459 (1968) 38

Hicks v. United States, 368 F.2d 626 (4th Cir. 1966) 52-55

Page

House v. European Health Spa, 239 S.E.2d 653 269 S.C. 644 (1977) 39,40,62

Inwood Laboratories, Inc. v. Ives Laboratories, Inc. 456 U.S. 844 (1982). . . 30,58,59

Johnson v. U. S., 336 F.2d 801 (4th Cir. 1964). 51

Kennedy v. Custom Ice Equipment Co. Inc., 246 S.E.2d 176, 271 S.C. 171 (1978) 28

Kloster v. Steamship Chatham C. A., 475 F.2d 43 (4th Cir. 1973) 32,55

Lane v. United States, 529 F.2d 175 (4th Cir. 1975). . . 55

Mamiye Bros. v. Barber S. S. Lines, Inc., 360 F.2d 774, cert. den 385 U.S. 835 (1966) 46

McAllister v. United States, 348 U.S. 19 (1954) . . . 43-46,55

Merriman v. Sea Pines Plantation Company, 294 S.E.2d 423, 278 S.C. 263 (1982). 39,61

Nelson v. Jacksonville Shipyards, Inc., 440 F.2d 668 (5th Cir. 1971). 45

Nolan v. Sullivan, 372 F.2d 776 (3rd Cir 1967) 49

Oblensky v. Saldana Schmier, 409 F.2d 668 (5th Cir. 1971) . 45

Page

Pennsylvania Railroad Co. v. S.S. Marie Leonhardt, 320 F.2d 262 (3rd Cir 1963) . . 48

Quinn v. United States, 439 F.2d 335 (8th Cir 1971) . . 45

Richards v. United States, 369 U.S. 1 (1962). 39,60

Scheel v. Conboy, 551 F.2d 41 (4th Cir. 1977) 55

Taylor v. Bryant, 265 S.E.2d 514, 274 S.C. 509 (1980). . 37

Taylor v. United States, 360 F.2d 488 (4th Cir. 1966) 51,52

Thompson v. United States, 268 F.2d 426 (4th Cir. 1959) 51

Tucker v. Calmar Steamship Corp., 457 F.2d 440, 444 (4th Cir. 1972) 32,55

U.S. vs. U.S. Gypsum Co., 333 U.S. 364 (1948) 57

United States v. Yellow Cab Co., 338 U.S. 338 (1949). . 58

Verbeeck v. Black Diamond S.S. Corp., 269 F.2d 68, cert. den. 361 U.S. 934 (1961). . 46

Whelan v. Penn Central Co., 503 F.2d 886 (2nd Cir. 1974) 47

Williams v. Kinney, 226 S.E.2d 555 267 S.C. 163 (1976) . . 40,62

Page

Willis v. Floyd Brace Company, Inc., 309 S.E.2d 295, S.C. 458 (S.C. App. 1983) 40,62

Wiseman v. United States, 327 F.2d 701 (3rd Cir. 1964) . . . 48

Zenith Radio Corp. v. Hazeltine Research, Inc., Inc., 395 U. S. 100 (1969) 58

Page

Statutes and Rules

14 CFR 71.11 (1983) 10

14 CFR 91.107 (1983). 10

14 CFR 91.115-.129 (1983) . . 6

14 CFR Section 91.3(a). . . . 22

14 CFR Section 91-105 (1983). 6

Rule 52(a), Federal Rules of Civil Procedure 3,24,26,30,31,33,38,39,41,42,50,53,54,55,57,59

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Websters Third International Dictionary 2537 14

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52 St. John's L. Rev. 68 (1977) 33

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PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
FOURTH CIRCUIT

Petitioner Julian W. Rawl respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 4, 1985.

OPINIONS BELOW

The decision of the court of appeals is reported at 778 F. 2d 1009 (4th Cir. 1985) and is set out at pp. 39-57 of the Appendix to the Petition. The order denying rehearing and suggestion for rehearing en banc, which is not reported, was filed on January 21, 1986, and is set out at p. 58 of the Appendix. The District Court's Findings of Fact, Conclusions of Law and Order, which are not reported, are set out at pp. of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1985. A timely Petition for Rehearing was filed, which was denied on January 21, 1986. Jurisdiction of this court is invoked under 28 U.S.C. Section 1254.

RULE INVOLVED

Rule 52 (a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusion of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which consitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses....

STATEMENT OF THE CASE

On December 23, 1980, Petitioner commenced this action in the United States District Court for the District of South Carolina, Charleston Division. The action

was brought under the Federal Tort Claims Act, 28 U.S.C. Section 2671, et seq. The claim arose out of an airplane crash which occurred on February 17, 1978, near the Grand Strand airport at Myrtle Beach, South Carolina, which took the lives of Edwin E. Rawl, Jr., and his wife, Josie W. Rawl. Petitioner is administrator of the estate of Edwin E. Rawl, Jr.

Petitioner's complaint alleged that the defendant's, U.S.A.'s, agents and employees, acting within the course and scope of their employment with the defendant, and in particular one air traffic controller, violated certain Federal Aviation Administration ("FAA") regulations and procedures, and committed other acts of negligence which led to the crash.

The case was heard at a non-jury trial on August 31 and September 1 and 2, 1983. Oral

arguments were made by the parties on January 17, 1984. The testimony was extensive, including that from air traffic control experts, a pilot expert and submission of countless pages of transcripts from radio transmissions culminating in the crash of Edwin E. Rawl, Jr.

The facts in this matter are far from simple. On the afternoon of February 17, 1978, petitioner's intestate, Mr. Rawl, left the Grand Strand Airport at Myrtle Beach, South Carolina at approximately 5:45 p.m., with a planned destination of Greenville, North Carolina, a distance in flying time of approximately one hour. He was flying an airplane which he owned, a 1977 Beechcraft Bonanza, bearing FAA registration number N17523. Mr. Rawl was certified by the FAA to fly airplanes under visual flight rules ("VFR"). Visual flight rules means a pilot flies by

sight. It is authorized and quite normal for a "VFR" pilot to fly either during the daytime or nighttime, See 14 C.F.R. Section 91-105 (1983). The FAA provides another certification, instrument flight rules or "IFR" which means a pilot must be able to fly relying on his or her instruments alone. See 14 C.F.R Section 91.115-.129 (1983). Mr. Rawl was not certified as an IFR pilot.

On numerous occasions during the day on February 17, Mr. Rawl contacted Myrtle Beach Flight Service Station for weather information. His last contact with Flight Service was at 5:34 p.m. approximately eleven minutes prior to his flight from Myrtle Beach to Greenville. Those forecasts indicated VFR flight conditions were present with hazy visibility and a forecast for deterioration of those conditions towards the middle

of the evening. In fact, the weather report disseminated by Flight Service failed to be accurate as the weather conditions deteriorated more rapidly than forecast, so that visibility at the Grand Strand Airport was less than two miles at the time Mr. Rawl left the airport with fog and haze present. There was a broken layer of clouds at 500 feet and the same at 3000 feet. On his take off, Mr. Rawl broke out of the scattered clouds at approximately 800 feet and remarked that he had been able to see all the way through it.

Mr. Rawl arrived at the Greenville, North Carolina airport a short time later and picked up his wife. Twenty minutes later he took off again, heading towards Myrtle Beach. Mr. Rawl was returning with Mrs. Rawl as they were to be guests at a dinner that evening around 8:00 p.m.

During the period after Mr. Rawl left Myrtle Beach to the time he returned to the Myrtle Beach vicinity, the weather had deteriorated extensively with unusual rapidity. The forecasts of the Flight Service simply failed to predict or adequately depict this rapidly changing weather condition. An unusually thick fog settled in the area. The plaintiff himself, Mr. Rawl's son, upon exiting a restaurant where he had just eaten dinner, became concerned about the change and proceeded to promptly call both Radar Approach Control ("RAPCON") and Myrtle Beach Approach Control[1] to plead with them to tell his father of the

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[1]The approach control tower and the radar approach control ("RAPCON") were under the control of and operated by the Air Force at the time of these events. The FAA had delegated authority to control civilian planes flying into the Grand Strand Airport to the Air Force.

change in weather conditions and communicate to Mr. Rawl that he needed to divert to Wilmington, North Carolina where the weather was clearer and plaintiff would have a car waiting to transport Mr. and Mrs. Rawl back to Myrtle Beach. Five such calls were made to RAPCON and one to Approach Control. While it is uncertain when the calls were made, it is known at least two calls were made prior to the crash. No such warning or message was delivered to Mr. Rawl.

Mr. Rawl first made contact with the Myrtle Beach Approach Control at or about 7:19:40 p.m.[2]

At Approximately a minute later at 7:20:52 p.m., Mr. Rawl informed the RAPCON that he was flying under visual flight rules or

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[2]All references to time in the petition are given in Eastern Standard Time--hours, minutes and, in instances where available, seconds.

VFR. In preparation for entering the control zone[3], Mr. Rawl became classified as special VFR.[4] About seven minutes later at 7:29:23 p.m., Mr. Rawl reported that he was flying in VFR conditions as he approached the Grand Strand Airport.

At approximately 7:28:30 p.m. and again at approximately 7:42:57 p.m., Mr. Rawl was told to stay clear of the control zone and to expect a ten minute delay.

While Mr. Rawl was in a

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[3]A control zone is "a circular area with a radius of 5 miles and any extensions necessary to include instrument approach and departure parts." 14 CFR Section 71.11 (1983).

[4]The special VFR weather minimums are found at 14 CFR Section 91.107 (1983). Visibility must be at least one statute mile, and the special minimums under this section are inapplicable between sunset and sunrise. In essence, the special VFR allows a pilot to fly within controlled airspace as long as there is at least one mile of visibility and the pilot stays clear of clouds. Further, a special VFR only applies to flight within the control zone.

holding pattern, the RAPCON was attempting to bring Cessna 46309 into the airport. Like Mr. Rawl, the pilot of Cessna 46309 was flying with special VFR clearance. That pilot made several passes over the Grand Strand Airport but was unable to see it. At approximately 7:50:18 p.m. the flight data position at the Grand Strand Airport tower declared Cessna 46309 to be involved in an emergency situation. At approximately 7:50:18 p.m., Cessna 46309 landed, but ended up off the airfield in the grass. For a period of time, while Cessna 46309 was in the air until the aircraft was rediscovered in the grass, radio contact with Cessna was nonexistent. From peals of laughter heard from the microphone at the flight data position within the control tower, the comment was made, "tell Cessna if he can't fly it, fuck him." The

RAPCON was aware of the difficulty the Cessna had in attempting to land and that the attempt to get it down safely had been labeled an emergency. There was no evidence Mr. Rawl realized the difficulty of Cessna 46309.[5] Apparently, believing the landing was uneventful, Mr. Rawl requested RAPCON to inform him of the altitude Cessna had broken through the cloud cover.

At approximately 8:00 p.m., Mr. Rawl was cleared to approach the Grand Strand control zone from the northeast. He was told to maintain special VFR conditions at or below 1500 feet. He was approximately seven miles from the airport at this time.

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[5]In its opinion and without citation in the record, the Court of Appeals disregards the District Court's finding that Mr. Rawl was unaware of the difficulties of Cessna 46309 and makes its independent finding that Mr. Rawl was aware of Cessna's problems.

At approximately 8:03:16 p.m., RAPCON suggested that another small aircraft, Baron 9669 Yankee divert to Wilmington, North Carolina where the weather was better than Myrtle Beach at three mile visibility with fog and haze. 9669 Yankee did not land at Myrtle Beach following this suggestion. A similar suggestion was not made to Mr. Rawl nor did Mr. Rawl hear the suggestion given to 9669 Yankee because he was on a different radio frequency at that time.

The next communication with Mr. Rawl was at approximately 8:04 p.m. He informed RAPCON that he had approximately four hours of fuel left. He was still flying at 2500 feet and indicated he believed he would be unable to see the airport at that altitude. At or about 8:04:51 p.m., Mr. Rawl asked

for vectors[6] to the airport believing he could "slip right down under it." At this time, Mr. Rawl maintained an altitude of 2500 feet. It further appears he was flying between layers of clouds at 1000 feet and 3000 feet. VFR conditions were present though it is not clear what the actual conditions of the clouds were between the cloud layers.[7] It further appears that while VFR

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[6]Vector used as a verb, means to guide in flight by means of radioed vector. WEBSTERS THIRD INTERNATIONAL DICTIONARY 2537 (1976). A radar vector is a specific heading derived from a radar and given to a pilot.

[7]The air traffic control manual requires that controllers become familiar and stay aware of pertinent weather information. The manual further requires that controllers solicit pilot weather reports (PIREPS) from aircraft when ceilings are at or below 5000 feet and visibility is at or less than five miles. PIREPS were not obtained by airman Hennessey on this evening later than 7:00 p.m. See Air Traffic Control Manual Chapter 2, Section 40; Chapter 3, Section 18, paragraph .521; Chapter 2, Section 2, paragraph 4.

conditions existed between the clouds, the outside visual references were obscured or severely limited by the clouds, the Atlantic Ocean to the East, and unpopulated areas to the West. It is important that Mr. Rawl experienced no difficulty flying under these circumstances and had done so for approximately thirty minutes.

During Mr. Rawl's exchange with RAPCON, which began at 8:04, he was told to descend and maintain 1600 feet.

At or about 8:05:17 p.m., Mr. Rawl was outside the control zone flying in a generally northeast direction which would be a heading of 045. At 8:05:17 p.m., Mr. Rawl was told by RAPCON to turn left to a heading of 270. This is a left turn of 135°.

Following this instruction, at or about 8:06:36 p.m., Mr. Rawl was

asked to state his heading. He responded that he was at "300", which meant that he had completed 105° of the previous command to turn left 135° to a 270° heading.

Though Mr. Rawl advised that he was at 300, a portion of that communication was inaudible so that all Airman Hennessey heard was 30.[8] Rather than asking Mr. Rawl to clarify his answer, Hennessey incorrectly assumed that the heading given was 030 and, based upon that false assumption, told Mr. Rawl to turn right to 120, a turn of 180°.

Someone in the control tower overheard the conversation between Hennessey and Mr. Rawl at about 8:06:36, and told Hennessey he thought he, Hennessey, had misunderstood Mr. Rawl. Hennessey then asked Mr. Rawl for clarification,

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[8]The correct manner which "30" would be communicated would be 030.

which he received at 8:06:53 p.m. Mr. Rawl, at that time, advised that his 8:06:36 p.m. response had been 300 and proceeded to give his then current heading of 330. Hennessey then told Mr. Rawl to turn left to a heading of 220, a turn of 110 degrees. It is unknown exactly what his heading was before he went into a dive, however, it appears obvious he was unable to complete this final turn. In terms of degrees, Hennessey, in the space of one minute and thirty-six seconds, instructed Mr. Rawl to turn left 135 degrees, then back right, 180 degrees, then back left 110 degrees.

Mr. Rawl's final transmission occurred at approximately 8:07 p.m. During this transmission, the audio level dropped as if his microphone was being pulled away from his mouth.

Shortly following this last

transmission, the RAPCON radar screen showed Mr. Rawl's plane descending from 2500 feet to about 1600 feet in a space of five seconds. Within five seconds more the plane had disappeared.

During these last moments of his father's flight, plaintiff continued to call the airport and request his father be diverted to Wilmington, North Carolina. On his last call, in response to his question whether his father was still airborne, the line went dead.

It is uncontroverted that the crash resulted from Mr. Rawl's developing spatial disorientation brought on by the series of turns directed by Hennessey.

Spatial disorientation is a condition which results from a conflict between one's visual clues and inner feelings. When a pilot is deprived of normal visual clues, false sensations may envelop him or

her and he or she quite simply may not be able to tell which end is up. For example, he or she may have the sensation of climbing when the plane is actually descending. This condition may occur while a pilot is in straight flight if there are uneven light sources, a slanting, uneven cloud bank or sunlight through haze hitting a propeller. It may also be induced by putting the plane through turns or by head movements by the pilot. Mr. Rawl developed spatial disorientation because he was deprived of outside visual references and was directed to execute several sharp turns within a very short period of time. Hennessey had been briefed on spatial disorientation during his training and knew that one of the duties of a controller was to avoid inducing spatial disorientation in pilots. He also knew one

of the activities he should guard against was directing the pilot to make excessive turns, that is one turn right after another turn after another.

Section 1592 of the Air Traffic Control Manual[9] entitled "Radar Assistance Techniques" reiterates this concern and provides as follows:

> Use the following techniques to the extent possible when you provide radar assistance to a pilot not qualified to operate in IFR conditions:
>
> a. Avoid radio frequency changes except when necessary to provide a clear communications channel.
>
> b. Make turns while the aircraft is in VFR conditions so it will be in a position to fly a

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[9]The Air Traffic Control Manual, an official, internal document of the FAA prescribes air traffic control procedures and phraseology for use by personnel providing air traffic control services. "Controllers are required to be familiar with the provisions of the handbook which pertain to their operational responsibility and to exercise their best judgment if they encounter situations not covered by it." Air Traffic Control Manual Section 7110.65A Foreword.

straight course while in IFR conditions.

c. Have pilot lower gear and slow aircraft to approach speed while in VFR conditions.

d. Avoid requiring a climb or descent while in a turn if in IFR conditions.

e. Avoid abrupt maneuvers.

f. Vector aircraft to VFR conditions.

The procedures outlined in this section grew out of training given to controllers to help them deal with spatial disorientation.

With the foregoing facts presented to him the District Court resolved the questions of negligence and proximate cause in favor of plaintiff. In the Findings of Fact and Conclusions of Law filed October 12, 1984, the trial judge held that the government was negligent in directing Mr. Rawl to make the turns that were ordered between 8:05:17 p.m. and 8:06:55 p.m. The court further found the government negligent for Hennessey's interpretation of Mr. Rawl's heading report of 8:06:36

p.m. as being 30 degrees and not requesting Mr. Rawl to repeat the report until it was clear.

The court found these acts proximately caused the crash and subsequent death of Mr. Rawl.

The court further found petitioner's decedent lacked any contributory negligence.

The government contended Mr. Rawl was contributorily negligent on two basic grounds. The first being on the basis of an FAA regulation, 14 C.F.R. Section 91.3 (a), which states;

> "The pilot in command of an aircraft is directly responsible for and is the final authority as to the operation of that aircraft."

This defense is commonly called the "pilot in command" defense. Secondly, the government asserted that Mr. Rawl's acceptance of the special VFR after sunset constituted negligence on his part. The

court determined, and the government conceded with reference to the second defense, that at the time of the crash, Mr. Rawl was clearly outside the control zone in VFR conditions with a VFR rating. The court there held that any acts which Mr. Rawl may have done earlier with regards to accepting a special VFR simply were not proximate to the crash.

With regards to the pilot in command defense, the court again found there was no causal connection between Mr. Rawl's crash and his reliance on the weather as he knew had it had been when he left Myrtle Beach and as it had been forecast by the government via flight service in making his decision to pursue his course to Myrtle Beach. The court very clearly found the acts which the government contended constituted contributory negligence on the part

of Mr. Rawl had no causal connection whatsoever to the crash and subsequent death of Mr. Rawl.

The Fourth Circuit Court of Appeals begins its discussion by upholding the District Court's findings of negligence on behalf of the government. The court then recites Federal Rule of civil procedure 52(a) which prohibits the court from setting aside findings of fact unless clearly erroneous and cases that support this rule, including the recent Supreme Court case of Anderson v. City of Bessemer City, 470 U.S. _____, 105 S.Ct. 1504 (1985). The court, in the next sentence, in essence states that if it characterizes the District Court in the instant case as having made a mistake in the rule of law or a mistake in the application of law to the facts, it would be permitted to correct the error without regard to the

"clearly erroneous" standard. In an opinion decided December 4, 1985, the Fourth Circuit reversed the District Court by stating,

> "From the facts, we conclude that, as a matter of law, Rawl was not only negligent, but contributorily negligent as well."

A timely petition for rehearing and suggestion for rehearing en banc was denied on January 21, 1986.

REASONS FOR GRANTING THE WRIT

(1)

Certiorari Should Be Granted to Review the Fourth Circuit's Practice of Circumventry the Protections Afforded the Findings of Fact of a Trial Court Under Rule 52 (a), Federal Rules of Civil Procedure, by Characterizing its De Novo Findings of Fact as Corrections of the District Court's Error of Law.

The Fourth Circuit Court of Appeals decision in this case is a direct statement of how it intends to circumvent Federal Rule of Civil Procedure 52(a) and this court's very recent admonition to the Foourth Circuit for misapplying 52(a) in Anderson v Bessemer City 407 U.S. _____, 105 S.CT.1504 (1985). In the instant case, the Court of Appeals makes reference to the Anderson decision which dictates that findings of fact of a lower court may be overturned only when "clearly erroneous," and then

quite amazingly says it need not apply the "clearly erroneous" standard if it recharacterizes findings of fact as matters of law. This portion of the order bears repeating:

> "Of course, we are aware of the limits placed upon us as an appellate court reviewing a trial court's decision. We may not overturn findings of fact unless they are "clearly erroneous" Fed. R. CW. P. 52(a). ... The clearly erroneous rule applies even when the trial court's findings are based upon physical or documentary evidence, or inferences from the facts. Anderson v City of Bessemer City, 407 U. S. _____, 105 S.CT. 1504 (1985). In the case sub judice, however, we find a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts. Characterized in either fashion, the situation permits us to correct the error in the District Court.[9]" App.pp 48-49. (Emphasis added)

After espousing the above proposition the Court of Appeals goes on to decide

> "From the facts, we

> conclude that, as a matter of law, Rawl was not only negligent, but contributorily negligent as well." App.p 51

The Fourth Circuit improvidently determined that by making findings of fact as a matter of law, they cease to be findings of fact.

The Fourth Circuit improvidently determined in this case that if it reversed the lower court's findings of fact "as a matter of law" and reinstated its own, it was not making findings of fact.

This theory is inconqruous. When a court finds a fact "as a matter of law" it is determining there is but one reasonable inference to be taken from the evidence under South Carolina law, Kennedy v Custom Ice Equipment Co. Inc.,246 s.e. 2d 176, 271 S.C. 171 (1978);

Brown v Howell 327 S.E. 2d 659

(S.C. App. 1985); Darter v Greenville Community Hotel Corp., 301 F. 2d 70 (1962).

Determinations that there is but one reasonable inference to be drawn from the facts presented are to be made by the trial court and usually when determining whether to submit an issue of fact to a jury. The corresponding standard at the appellate level is the "clearly erroneous" test. Hence, the Court of Appeals cannot circumvent the appropriate standards by denoting they have made their findings of fact as a matter of law.

Although the Fourth Circuit stated it made its findings as a matter of law it never addressed the question regarding contributory negligence whether there was but one reasonable inference to be drawn from the evidence in the record. The reason the Court of Appeals failed to so

mention is because where there is more than one permissible view of the evidence, the fact finder's choice between them cannot be clearly erroneous. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982); Anderson v City of Bessemer City 407 U.S. _____, 105 S.Ct. 1504 (1985). In making its skewed view of the facts, the Fourth Circuit Court of Appeals has done precisely what Rule 52(a) guards against. That is, it has made an independent, de novo finding of fact without regard to the lower court's determination. If this be the appropriate workings of the appellate courts then today in Maryland, Virginia, West Virginia and the Carolinas, the rule of federal district judges in cases involving negligence findings of fact is merely to compile the record on which the Fourth Circuit

will base its de novo determination. In any case in which a district judge decides to role for the plaintiffs, the drafting of the findings of fact and conclusions of law required by Rule 52(a) is generally pointless, since such findings will ordinarily carry no weight and should this court make demand that findings of fact be given weight as it did in Anderson Id., then the Fourth Circuit will simply rename them and then disregarad them on appeal by making its own findings of fact and say they are making them as "matter of law."

Tragically, the Fourth Circuit acknowledged that the facts of this case were complex, yet disregarded the deference to be given to the trial judge's position in seeing and hearing the evidence first-hand.

As an alternative position the Fourth Circuit in footnote nine states that the "clearly erroneous" standard is inapplicable where the court is reviewing mixed questions of law and fact. App.p. 49. In support of this proposition, the court cites decisions from the Second, Third, and Tenth circuits. Noticeably absent are citations from the Fourth Circuit and a close examination of those cases reveals why. The matter is well settled in the Fourth Circuit. Where there are mixed questions of law and fact the Fourth Circuit applies the "clearly erroneous" standard of review. See Tucker v Calmar S.S. Corp 457 F.2d 440 (4th Cir 1972). See also Kloster v Steamship Chatham 475 F 2d 43 (4th Cir. 1973).

The Fourth Circuit simply cannot correctly state that it is making no finding of facts when,in

actuality, it finds many of the facts to be opposite to those determined by the District Court. Questions of fact have been defined as those whose resolution is based ultimately on the application of the fact finder's human conduct. Likewise, legal conclusions are those based in application of a legal standard. See Note, "Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has application of the clearly erroneous rule been clearly erroneous." 52 St. John's L.Rev. 68 (1977). The Fourth Circuit's decision is replete with such contra findings, however, petitioner gives the following as exemplification.

The District Court finds that Mr. Rawl was reasonable to rely upon the conditions as he knew them when he departed frcm Myrtle Beach for the short trip to Greenville

and on the weather forecasts which were reported by the Flight Service Station (that have been shown to be incorrect) in deciding to make the return flight to Myrtle Beach. The District Court further found that the deterioration of weather conditions following Mr. Rawl's departure was most unusual. When Mr. Rawl departed he had experienced no problem with the cloud cover obscuring his view. There were certainly other VFR pilots, namely 6996 Yankee and 46309 Baron, in the vicinity along with Mr. Rawl. Without any mention that the finding by the District Court was clearly erroneous, the Fourth Circuit, citing nothing in the record as support, makes the sweeping determination that

> "When he, Rawl, departed Greenville on the return flight, he knew or should have known that conditions precluded VFR landing at Grand Strand." App p. 51.

Likewise and without citing any support in the record the Fourth Circuit states

> "... it is at least true that Rawl was flying in circumstances that a reasonable pilot with similar qualifications, or perhaps, more accurately with similar lack of qualifications would have shunned." App.p. 50

Such a broad indictment of plaintiff's decedent is tragic, especially when, if the court of appeals had reviewed the record it would have realized that it is uncontroverted that at the time the turns commenced, as directed by Hennessey, Mr. Rawl was flying in VFR conditions for which he was undisputably qualified. App.p. 50. The record further reflects that instrument qualification is not necessary for VFR flying. There were, incidentally, at least two other VFR pilots attempting to land at Myrtle Beach at approximately

the same time.

The District Court further determined that Mr. Rawl was unaware of the difficulty that Cessna 46309 experienced in trying to land. The District Court had presented to it the actual tapes of the transmissions, printed transcript from those tapes and two air traffic control experts to help it make that determination. Again the Fourth Circuit without finding the District Court clearly erroneous and without any reference to the record states, "...Rawl was on the same frequency as that of the Cessna..." App.p. 51.

As a further finding of fact, characterized as a correction of an error of law the Fourth Circuit states "Rawl insisted upon landing at Grand Strand despite the conditions there..." That the Fourth Circuit could and would make a determination of Mr. Rawl's state

of mind without any credible evidence and certainly without citation from the record is disturbing. This finding concerning the state of mind of Mr. Rawl prior to the crash comes completely "out of the blue."

Based upon the foregoing findings of fact or, as the Fourth Circuit calls them, errors in law, the Fourth Circuit concludes that Mr. Rawl was "not only negligent but contributorily negligent." It is notable that the Fourth Circuit's statement appears to imply that contributory negligence is something more than or worse than negligence, however, South Carolina law is clear that contributory negligence is the negligence of a claimant which contributes to his injury. Taylor v Bryant 265 S.E. 2d 514, 274 S.C. 509 (1980).

Findings of proximate cause,

like determinations of negligence, are findings of fact. Hawkins v Southern Ry. Co. 45 FRD. 459 (1968); Graham v Whitaker 321 S.E. 2d 40, 282 S.C. 393 (1984). The District Court clearly found no activity on behalf of Rawl proximately caused his injury which finding is essential to a determination of contributory negligence. Graham Id. In order to have found Mr. Rawl contributorily negligent, the Fourth Circuit necessarily must have made a finding of fact of proximate cause. In order to do this, the Fourth Circuit had to replace its finding of proximate cause for the District Court's finding of no proximate cause. To do this, the Court of Appeals necessarily is squarely within Rule 52(a) and Anderson. Supra. The court of appeals cannot make this substitution unless the District

Court's finding is "clearly erroneous." Again, however, the Court of Appeals ignored 52(a) and yet "concluded that Rawl's negligence was a concurrent proximate cause of the crash..."

The Court of Appeals further ignored the substantive law of South Carolina to which it is bound as the accident occurred in South Carolina. Richards v United States, 369 U.S. 1 (1962).

The clear rule in South Carolina is that the issues of negligence, contributory negligence and proximate cause are questions of fact for the jury, the trier of fact. Graham v. Whitaker, 321 S.E. 2d 40, 282 S.C. 393 (1984); Merriman v. Sea Pines Plantation Company., 294 S.E. 2d 423, 278 S.C. 263 (1982). Contributory negligence only becomes a matter of law when the evidence admits but one reasonable inference. House v.

European Health Spa, 239 S.E. 2d 653, 269 S.C. 644 (1977); Williams v Kinney, 226 S.E. 2d 555, 267 S.C. 163 (1976).

Where evidence is susceptible to more than one reasonable inference on the issue of contributory negligence, the issue must be determined by the trier of facts. Willis v. Floyd Brace Company, Inc., 309 S.E. 2d 295, 279 S.C. 458 (S.C. App. 1983).

Clearly, more than one reasonable inference was permissible from the evidence in the record. Rather than addressing whether the District Court's findings were reasonable inferences, the Fourth Circuit merely ignored the law of South Carolina and made its own de novo review of the record and concluded that Mr. Rawl was contributorily negligent and that his negligence was a "concurrent proximate cause

of the crash."

The Court of Appeals makes much of the District Court's discussion of intervening and superceding negligence on the part of the government. This discussion was based upon an arguendo assumption that petitioner's decedent was contributorily negligent. The court, however, made its findings of negligence prior to and independent of this intellectual inquiry. The court was careful at the end of this discussion to reiterate that it was not finding Mr. Rawl contributorily negligent.

The Court of Appeals states it is making no findings of facts and therefore need not heed the admonitions of Federal Rule of Civil Procedure 52(a). A comparison of the two decisions reveals most emphatically the two courts viewed the facts from the

positions diametrically opposed. In fact, the only essential fact on which these courts concur is that had Mr. Rawl not been flying the evening of February 17, 1978, there would have been no crash. This Petitioner prays this court protect for this individual and for other appellees, the protections and directives of Rule 52(a) and this court's decision in Anderson v. City of Bessemer City Supra.

(2) Certiorari Should Be Granted To Resolve A Conflict in the Circuits and Within the Fourth Circuit Regarding whether Rule 52(a), Federal Rules of Civil Procedures Forbids Appellate Review of Trial Court Findings of Negligence as Findings of Fact.

There is a lack of uniformity among the circuits and within the Fourth Circuit on the scope of review by an appellate court of a trial court's findings of negligence.

A majority of the circuits apply the ruling of McAllister v. United States, 348 U.S. 19 (1954). In McAllister, the District Court found a shipowner negligent for permitting conditions to exist upon a ship conducive to the transmission of polio, and as a result the plaintiff was exposed to and contracted the disease. The Second Circuit Court of Appeals reversed the District Court on the ground that the negligence of the shipowner was not shown to have been the proximate cause of the polio and that the trial court's finding could not be sustained.

On certiorari, this court reversed the appellate court as clearly erroneous in view of the evidence in the case, and reinstated the judgment of the District Court. This court said:

> "On evidence showing these facts, including

> the opinion of the experts, we think there was substantial evidence from which the District Court could and did find that respondent was negligent in permitting these Chinese, from the infested area of Shanghai, to have the run of the ship and use of its facilities and in furnishing the crude and exposed latrine provided on the deck of the ship...Of course, no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon the balance of the probabilities, it seems a reasonable inference for the District Court to make from the facts proved..., that Petitioner was contaminated by the Chinese who came aboard the ship...Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous...We think it was an allowable judgment of the District Court and the judgment of the Court of Appeals is reversed." 348 U.S. at 22-23.

The court in McAllister concluded that the findings of the District Court regarding negligence and causation were not clearly

erroneous, thereby holding that findings of negligence are reviewable only under the "clearly erroneous" standard.

A majority of the courts of appeal have applied the ruling in McAllister in determining that findings of negligence and contributory negligence are reviewable under the "clearly erroneous" standard. Oblensky v. Saldana Scohmier, 409 F.2d 52 (1st Cir. 1969); Nelson v. Jacksonville Shipyards, Inc., 440 F.2d 668 (5th Cir. 1971). This standard has also been applied to the related issue of proximate cause Quinn v. United States, 439 F.2d 335 (8th Cir. 1971); Bethelem Steel Corp. v. Yates, 438 F.2d 798 (5th Cir. 1971)

The Second Circuit, however, has tended to traditionally ignore McAllister by determining that findings of negligence are not subject to the "clearly erroneous"

standard. The Second Circuit continued to apply this view after McAllister without even discussing the applicability of McAllister. Verbeeck v. Black Diamond S.S. Corp., 269 F.2d 68, cert. den. 361 U.S. 934 (1961); Dale v. Rosenfeld, 229 F.2d 855 (2d Cir. 1956). The Second Circuit held in Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, cert. den. 385 U.S. 835 (1966), that its view that negligence findings were freely reviewable was sound despite McAllister.

More recent cases decided by the Second Circuit indicate a possible shift in its position regarding the reviewability of negligence findings. In two cases decided in 1974, the court strengthened the deference to be given to findings of negligence by a trial court by holding that although findings of negligence are

reviewable as findings of law, they should not be overturned by the appellate court unless the lower court manifests an incorrect conception of the law. Whelan v. Penn Central Co.; 503 F.2d 886 (2d Cir. 1974) and Erie Lackawanna Ry Co. v. Timpany, 495 F.2d 830 (2d Cir. 1974).

The Second Circuit has even gone as far as to uphold findings of negligence on the ground that it could not hold the findings were clearly erroneous. Fuchstadt v. U.S., 434 F.2d 367 (2d Cir. 1970). Fuchstadt involved an action for negligence against the United States for personal injuries resulting from an automobile accident. The Second Circuit stated:

> "We are not left here with a definite and firm conviction that a mistake has been committed by the trial judge,... and hence we are unable to hold that these findings of

> fact (emphasis ours) are clearly erroneous within the meaning of Rule 52(a)...".

The Third Circuit has been influenced by the Second Circuit decisions. Prior to 1967, the decisions of the Third Circuit had held that findings of negligence, contributory negligence and proximate cause could not be set aside unless clearly erroneous regardless of what the Court of Appeals would have found if charged with the responsibility of the finding in the first place. Wiseman v. United States, 327 F.2d 701 (3rd Cir. 1964) and Pennsylvania Railroad Co. v. S.S. Marie Leonhardt, 320 F.2d 262 (3rd Cir. 1963).

In 1967, however, the Third Circuit departed from is earlier decisions to hold that a finding of contributory negligence is one of law and is reviewable on appeal

free from the restrictions of the clearly erroneous standard. Nolan v. Sullivan, 372 F.2d 776, 778 (3rd Cir. 1967). In Nolan, an action was brought for wrongful death resulting from an automobile accident. The District Court found that the defendent was guilty of negligence and that the decedent was guilty of contributory negligence. The Third Circuit reversed on the grounds that the conclusion that the decedent had been contributorily negligent was a conclusion of law reviewable freely upon appeal and not subject to Rule 52(a).

The Fourth Circuit has vacillated between the view traditionally espoused by the Second Circuit that findings of negligence are findings of law and are freely reviewable, and the view that the clearly erroneous standard applies to negligence findings.

Prior to 1966, the Fourth Circuit generally applied the clearly erroneous standard to findings of negligence. Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962). Darter involved an action against a hotel owner for personal injuries to a guest who was scalded. The Fourth Circuit held that negligence and contributory negligence are questions for the trier of fact, or the judge sitting without a jury. The court further held that the established rule is that findings of fact of the District Court

> "may not be set aside unless clearly erroneous-that is, unless unsupported by substantial evidence, unless against the clear weight of the evidence or unless induced by an erroneous view of the law."

The court then cited Rule 52(a). Factual questions settled by the findings of the District Court must be accepted by the

appellate court. Thompson v. United States, 268 F.2d 426 (4th Cir. 1959).

In Johnson v. U.S., 336 F.2d 801 (4th Cir. 1964), the Fourth Circuit again applied the clearly erroneous test to the District Court's finding of no negligence on the part of the defendant. In Johnson, an action was brought under the Federal Tort Claims Act for the wrongful death of a child run over by a bus. The court upheld the findings of no negligence by the District Court on appeal. The court stated that it was for the District Judge to make the subsidiary and ultimate findings and that his findings were binding upon appeal.

The clearly erroneous standard was again applied in Taylor v. U.S., 360 F.2d 488 (4th Cir. 1966), a case involving negligence and contributory negligence findings.

The District Court refused to conclude that the defendant was negligent and found that the plaintiff was contributorily negligent. The Fourth Circuit held that the findings of the District Court regarding negligence and contributory negligence were not clearly erroneous. The court stated:

> "Negligence and the capacity for it are questions of degree. The district judge was better positioned than are we to make the gradation judgment. It is neither appropriate nor necessary to determine whether we agree with his decision. It is enough that his determination is supported by substantial evidence and is not clearly erroneous." Id. at p. 490.

In 1966, however, in Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), the Fourth Circuit sharply departed from its earlier decisions by stating that it would adhere to the "general rule" that a

finding of negligence was freely reviewable. Hicks involved an action under the Federal Tort Claims Act alleging negligence of a doctor in diagnosing and treating a patient's illness. The District Court dismissed the case on the grounds of insufficient evidence to establish negligence or proximate cause. The Fourth Circuit reversed, holding that the doctor was negligent and that this holding was not inconsistent with Rule 52(a). The court stated that Rule 52(a) comes into play where the trial judge as fact finder has reconciled conflicting testimony or evidence and prevents a disturbance of those findings unless clearly erroneous, however, where the trial court's conclusions are

> "based on undisputed facts, they are not entitled to the finality customarily accorded basic factual findings under Rule 52(a)..."

The court in Hicks did not refer at all to its earlier decisions, which had generally applied the clearly erroneous standard to findings of negligence.

The Hicks decision has been severely criticized in the Fourth Circuit case Bonds v. Mortensen and Lange, et al, 717 F.2d 123 (4th Cir. 1983). In Bonds, a shipowner, challenged the District Court's findings of fact regarding the "responsibility and fault" of the shipowner for the injuries and death of a longshoreman by contending that the findings of the District Court regarding "responsibility and fault" were mixed questions of law and fact which were not entitled to the protection of the clearly erroneous standard of Rule 52(a), but rather subject to full review under Hicks. The Fourth Circuit disagreed that the findings were subject to full

review under Hicks The Fourth Circuit disagreed that the findings were subject to full review under Hicks and stated:

> "More recent decisions of our circuit indicate that the ruling in Hicks on this point has to a large degree been abandoned, see Famous Knitware Corp. v. Drug Fair, Inc., 493 F.2d 251, 253 n.2 (4th Cir. 1974), and indicate that a District Court's findings of negligence are generally treated as findings of fact reviewable under Fed. R. Civ. P. 52(a). Scheel v. Conboy, 551 F.2d 41, 43 (4th Cir. 1977); Lane v. United States, 529 F.2d 175, 180 (4th Cir. 1975); Kloster v. Steamship Chatham C.A., 475 F.2d 43, 44 (4th Cir. 1973); Tucker v. Calmar Steamship Corp., 457 F.2d 440, 444 (4th Cir. 1972)"

The other eight of the eleven circuits follow the majority view that findings of negligence cannot be disturbed by an appellate court unless clearly erroneous.

The Supreme Court's decision in McAllister v. United States, 348 U.S. 19 (1954), and the recent

Supreme Court decision Anderson v. City of Bessemer City, Supra. support this majority view.

In Anderson, the Fourth Circuit was held by this court to have misapplied the clearly erroneous standard in overturning the District Court's finding of sex discriminaiton. In Anderson a female teacher with college degrees in social studies and education applied for and was rejected for a job managing a city's recreational facilities and programs. A male who had recently graduated with a degree in physical education was chosen for the position. The selection was made by a committee.

After a trial in which testimony from Anderson, the male applicant who was hired, and members of the committee was heard, the District Court found that Anderson had been denied the position because of her sex.

The Fourth Circuit reversed the District Court's decision, holding that the District Court's findings were clearly erroneous. On certiorari, this Court held that the Fourth Circuit misapprehended and misapplied the clearly erroneous standard and thereby comitted error, and reversed the decision of the Fourth Circuit. This Court stated that a finding of intentional discrimination is a finding of fact and as such, the standard governing appellate review is that set forth in Federal Rule of Civil Procedure 52 (a)"

This court then discussed the meaning of "clearly erroneous" and stated:

> "A finding is `clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 92 L Ed

746, 68 S. Ct. 525 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. `In applying the clearly erroneous standard to findings of a District Court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 23 L Ed 2d 129, 89 S. Ct. 1562 (1969). If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 94 L Ed 150, 70 S. Ct. 177 (1949); see also Inwood

> Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 72 L Ed 2d 606, 102 S. Ct. 2182 (1982)." Anderson, Supra.

This court further stated that Rule 52 does not exclude any particular categories of factual findings from the appellate court's obligation to accept a District Court's findings unless clearly erroneous. Deference is given to the trial judge as the original finder of fact because of his superior position.

> "For these reasons, review of factual findings under the clearly erroneous standard-with its deference to the trier of fact-is the rule, not the exception." Anderson, Supra.

The Fourth Circuit erred in its application of the clearly erroneous standard and conducted what amounted to a de novo weighing of the evidence in the record.

Based on its review of the

record, this Court refused to find that the District Court's interpretaion of the facts in Anderson was illogical or implausible and declined to find them clearly erroneous, and therefore reversed the appellate court.

In addition to the existence of a conflict regarding the reviewability of negligence findings within the circuits and within the Fourth Circuit itself, there is a conflict present in the instant case between the law of South Carolina and the law applied by the Fourth Circuit.

A federal District Court and federal Court of Appeals must apply the law of the state in which it is sitting. Richards v. United States, 369 U.S. 1, 10 (1962). Therefore, in the instant case, the Fourth Circuit was required to apply South Carolina law regarding negligence,

contributory negligence and proximate cause.

The law of South Carolina is replete with the proposition that the issue of the existence of negligence or contributory negligence is a question of fact and not of law. Graham v. Whitaker, 321 S.E. 2d 40, 282 S.C. 393 (1984); Darter v. Greenville Community Hotel Corp., 301 F. 2d 70 (4th Cir. 1962). The South Carolina Supreme Court has held that in a neglience action, issues of negligence, contributory negligence and proximate cause are questions of fact for the jury, the trier of fact, and if more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit the issues to the jury. Graham v. Whitaker, Supra; Merriman v. Sea Pines Plantation Co., 294 S.E. 2d 423, 278 S.C. 263 (1982).

Under South Carolina law, contributory negligence only becomes a matter of law when the evidence admits but one reasonable inference. House v. European Health Spa, 239 S.E. 2d 653, 269 S.C. 644 (1977); Williams v. Kinney, 226 S.E. 2d 555, 267 S.C. 163 (1976). Where evidence on the issue of contributory negligence is susceptible to more than one reasonable inference, the issue must be determined by the trier of fact. Willis v. Floyd Brace Co., Inc., 309 S.E. 2d 295, 279 S.C. 458 (S.C. App. 1983).

In the instant case, the Fourth Circuit ignored the applicable law of South Carolina by finding contributory negligence on the part of Mr. Rawl as a finding of law. There was clearly more than one reasonable inference to be drawn from the evidence, therefore the issues of negligence and

contributory negligence were questions of fact for the trier of fact, rather than questions of law.

The Fourth Circuit failed to even address whether the District Court's decision as to its findings of no contributory negligence on the part of Mr. Rawl was a reasonable inference from the record. The court merely concluded from its de novo review of the record, that Mr. Rawl was contributorily negligent "as a matter of law", thereby ignoring the applicable law of South Carolina.

Certiorari should be granted to resolve these conflicts on the issue of the reviewability of findings of negligence as findings of fact.

Conclusions

For the above reasons, a writ of certiorari should issue to

review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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STATE OF SOUTH CAROLINA) CERTIFICATE OF FILING
COUNTY OF CHARLESTON)

PERSONALLY appeared before me G. Daniel Bowling, who being duly sworn, deposes and says that he has knowledge of the mailing of the Petition for Writ of Certiorari in the case of Julian W. Rawl, as Administrator of the Estate of Edwin E. Rawl, Jr. vs. United States of America to the correct address for the Office of the Clerk, Supreme Court of the United States, Washington, D.C. for filing.

That said original and forty (40) copies were placed in a package with prepaid first class postage by depositing said package and contents in the United States Mail at Charleston, South Carolina on March 22, 1986.

That to his knowledge the said original and forty (40) copies were mailed within the sixty (60) day time period for filing.

G. Daniel Bowling
Counsel of Record

Sworn to before me this 22nd day of March, 1986.

Notary Public for the State of South Carolina
My Commission expires: August 22, 1995

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Diane Schafer Goodstein, who being duly sworn, deposes and says that she served three (3) copies of the attached Petition Writ of Certiorari in the action of Julian W. Rawl, as Administrator of the Estate of Edwin E. Rawl, Jr. vs. United States of America to the person hereinafter named, at the place and address, by placing said copies in a package with prepaid first class postage and by depositing said package and contents in the United States Mail at Charleston, South Carolina pursuant to Rules 28.4 and 28.5 of the Rules of the Supreme Court. Affiant further states that all parties required to be served have been served.

Diane Schafer Goodstein

Solicitor General
Department of Justice
Washington, DC 20530

Sworn to before me this 22nd day of March, 1986.

Virginia C. Zuckowski
Notary Public for the State of South Carolina
My Commission expires: August 22, 1985